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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BY HAND DELIVERY

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

Re:

In the Matter of Amendment of Section 73.202(b) Table of Allotments, FM Broadcast Stations. (Llano and Marble Falls, Texas) MM Docket No. 95-49; RM-8558

Dear Mr. Caton:

Transmitted herewith on behalf of Roy E. Henderson and Tichenor License Corporation are an original and four (4) copies of a "Joint Petition For Reconsideration - Roy E. Henderson And Tichenor License Corporation" as directed to the Chief, Allocations Branch.

Should any additional information be required, please contact this office.

Very truly yours,

Henry E. Crawford
Counsel for
Roy E. Henderson

cc: The Chief, Allocations Branch

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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

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In the Matter of

Amendment of Section 73.202(b)
Table of Allotments,
FM Broadcast Stations.
(Llano and Marble Falls, Texas)

MM Docket No. 95-49
RM-8558

To: The Chief, Allocations Branch

**JOINT PETITION FOR RECONSIDERATION - ROY E. HENDERSON AND
TICHENOR LICENSE CORPORATION**

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June 30, 1997

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(Llano and Marble Falls, Texas)

MM Docket No. 95-49
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To: The Chief, Allocations Branch

**JOINT PETITION FOR RECONSIDERATION - ROY E. HENDERSON AND
TICHENOR LICENSE CORPORATION**

Roy E. Henderson ("Henderson") and Tichenor License Corporation ("Tichenor"), by counsel, pursuant to 47 CFR §1.429 respectfully submit their *Joint Petition for Reconsideration - Roy E. Henderson and Tichenor License Corporation*, seeking reconsideration of the Report & Order, DA 97-1115, released May 30, 1997 in MM Docket No. 95-49, RM-8558 ("Report & Order"). In support of the Petition, the following is stated:

I. INTRODUCTION

1. On November 15, 1994, Maxagrid Broadcasting Corporation ("Maxagrid"), licensee of FM station KBAE (FM)¹ on Channel 284C3 at Llano, Texas, filed a *Petition for Rule Making and for Order to Show Cause*. The petition sought to substitute Channel 285C3 at Marble Falls, Texas for Channel 284C3 at Llano, Texas, along with a concomitant change in the license of KBAE.

¹ Formerly, KLKM(FM).

2. Maxagrid also sought to allot Channel 242A to Llano in order to preserve local service at Llano. However, Maxagrid did not express a commitment to apply for Channel 242A at Llano.

3. On May 1, 1995, the Commission released a Notice of Proposed Rule Making, 10 FCC Rcd 4913 (1995) ("NPRM I"). The notice sought comments on the Maxagrid proposal. The allotment of Channel 242A at Llano was not made part of NPRM I since there was no commitment to apply for that channel.

4. In response to NPRM I, Maxagrid filed comments expressing for the first time an interest in applying for Channel 242A. At the same time, Henderson, licensee of KLTO(FM) on Channel 285A at Rosenberg, Texas, filed a counterproposal seeking to reallocate Channel 285A at Rosenberg as Channel 285A at Katy, Texas. Henderson further proposed to delete Channel 285A from LaGrange, Texas and reallocate it as Channel 285A at Smithville, Texas. Comments were also filed by the Kirkman Group, Inc. ("KGI"), licensee of KHLB(AM/FM), Marble Falls, Texas, opposing the Maxagrid proposal as an inefficient use of the broadcast spectrum.

5. On August 2, 1996, the Commission released its Further Notice of Proposed Rulemaking, 11 FCC Rcd 12647 (1996) ("NPRM II"). NPRM II sought comments and counterproposals in connection with the Channel 242A allotment at Llano, Texas.

6. In response to the NPRM II, Henderson filed a joint counterproposal along with Tichenor, licensee of KLTP(FM) on Channel 285A at

Galveston, Texas. The joint counterproposal sought to delete the allotment of Channel 285A at Rosenberg, Texas and reallocate it as Channel 285C3 at Missouri City, Texas ("Missouri City Counterproposal").² Additionally, the joint counterproposal sought to delete Channel 285A at Galveston and reallocate it as Channel 242C2 at Menard, Texas ("Menard Counterproposal").

7. On May 30, 1997, the Commission, by its Chief, Allocations Branch, issued the Report & Order. In the Report & Order, the Commission dismissed the counterproposal offered jointly by Henderson and Tichenor in response to the proposed allotment of Channel 242A at Llano. The counterproposals were dismissed because:

- a) The Commission misunderstood the Missouri City reallocation as a counterproposal to the original Marble Falls proposal, when, in fact, it was a counterproposal to the allocation of Channel 242A at Llano. It, therefore, mistakenly concluded that the Missouri City reallocation was untimely.
- b) The Commission misconstrued Tichenor's proposal to lack a sufficient commitment to apply for Channel 242C2 as a new allotment at Menard.

Report & Order, p. 2-3, ¶¶ 4-5.

8. In light of the above, the Joint Petitioners seeks reconsideration of the Report & Order and respectfully requests that it be set aside and that the joint counterproposal be adopted herein as the preferred arrangement of allotments.

² At the same time, Henderson formally withdrew his previous counterproposal, submitting all required documentation. Report & Order, p. 2, n. 3.

II. ARGUMENT

A. The Joint Counterproposal Was Properly Filed In Response To The Allotment Of Channel 242A At Llano As Proposed In NPRM II

9. The Commission's reason for dismissing the Missouri City Counterproposal is stated in the Report & Order in the following terms:

We are dismissing the Henderson counterproposal for a Channel 285C3 allotment at Missouri City because it is untimely. The Further Notice invited comments and counterproposals with regard to the proposed Channel 242A allotment at Llano. In this connection, the Further Notice specifically stated that we would not accept counterproposals regarding the reallocation of Channel 285C3 from Llano to Marble Falls. To be considered as a timely counterproposal in this proceeding, Henderson should have filed his Channel 285C3 counterproposal for Missouri City by the June 22, 1995, comment date set forth in the original Notice. Henderson did not file his counterproposal until September 23, 1996.

Report & Order, p. 2, ¶5.

10. Underlying the Commission's reasoning is the unspoken assumption that the Missouri City Counterproposal was filed in response to the reallocation of Channel 285C3 in NPRM I, and not in response to the Channel 242A allotment at Llano in NPRM II. As demonstrated in the attached engineering statement, that is clearly not the case.

11. To determine whether a given proposal is a counterproposal, the primary factor is mutual exclusivity. See, Franklin and Haverhill, New Hampshire, 2 FCC Rcd 447 (1987) ¶1; Banks, Oregon, 6 FCC Rcd 2462(1991) n.1. In the present case, as amply shown in the attached channel study, the joint counterproposal requires that Channel 285A at Galveston, Texas be relocated.

The Galveston licensee as Joint Counterproponent requested the deletion of Channel 285A at Galveston and requested that it be reassigned as FM Channel 242C2 at Menard, Texas. This is directly mutually exclusive with the Commission's further notice of proposed rulemaking in NPRM II proposing the lower class Channel 242A at Llano, Texas. Therefore, the joint counterproposal meets all technical and legal requirements.

12. The Commission faults the Missouri City Counterproposal for not having been filed by June 22, 1995, the time for filing counterproposals in connection with NPRM I. However, the Missouri City Counterproposal could not have been filed as a counterproposal in response to NPRM I. As demonstrated in the engineering statement, the Missouri City Counterproposal is not mutually exclusive with the original proposal contained in NPRM I. It is not mutually exclusive with NPRM I because the allotment of FM Channel 285C3 at Missouri City is not in any way mutually exclusive with the proposed assignment of Channel 285C2 at Marble Falls, Texas. Therefore, the Missouri City portion of the joint counterproposal could not have been lawfully filed within the context of the Marble Falls proposal in NPRM I.

13. It is settled law that a counterproposal need only comply with the Commission's technical requirements, contain an expression of interest in applying for the proposed facility, and be in conflict with a proposal made in the proceeding. Canovanas, Culebra, Las Piedras, Puerto Rico, 11 FCC Rcd 16392, 16397 (1966). As shown above, the joint counterproposal is technically sound as well as in direct conflict with the Channel 242 Llano proposal advanced by the

Commission in NPRM II. The Commission clearly sought such counterproposals and it was arbitrary and capricious error for the Commission to dismiss the joint counterproposal.

B. Tichenor Is Fully Committed To Applying For Channel 242C2 at Menard As A New Allotment

14. Tichenor expressed a unqualified commitment to go forward with the Menard Counterproposal. As stated in the September 23, 1996 Comments and Counterproposal:

Both Henderson and Tichenor are fully committed to the counterproposals set forth herein.

Comments and Counterproposal, p. 6. In addition, Tichenor further stated a commitment to:

... take all necessary actions to build and operate the station in Menard as requested.

Comments and Counterproposal, pp. 6-7.

15. Despite this unequivocal wording, the Commission wrongly concluded that Tichenor was not committed to applying for the station in a filing window open to competing applications. Tichenor is, in fact, committed to applying for Channel 242C2 as a new allotment at Menard open to competing applications and will build the station in the event that it is awarded the construction permit. Tichenor hereby restates that commitment through counsel. Therefore, it is beyond dispute that Tichenor remains committed to the Menard Counterproposal and will file an application in the event the channel is allotted to Menard.

16. Underlying the Commission's analysis is the mistaken notion that Tichenor asked to proceed under 47 CFR §1.420(i) of the Commission's Rules. See Report & Order, pp. 2-3, ¶4. Nowhere in the Comments and Counterproposal is such a request evident in connection with the Menard Counterproposal. On the other hand, in the case of the Missouri City Counterproposal, treatment under Section 1.420(i) was clearly contemplated by the language:

Since the assignment of channel 285C3 to Missouri City could not be made without deletion of that channel as presently assigned to KLTO in Rosenberg, the allotment of that channel to Missouri City would not be subject to outside expressions of interest.

Comments and Counterproposal, p. 3. There is no corresponding language pertaining to the Menard Counterproposal. Hence, it is only logical to infer that Tichenor wished to have its counterproposal treated as an allotment open to competing expressions of interest.

17. Indeed, the Commission acknowledged this construction of the Menard Counterproposal when it recognized that the "... Channel 242C2 proposal is mutually exclusive with the Channel 242A allotment proposed in the Further Notice...." and "...could have been considered in this proceeding as a counterproposal for a new allotment." Report & Order, p. 3, ¶4. However, the Commission seized upon Tichenor's commitment to proceed with "the entire counterproposal" and took this phrase out of context to mean that it would not apply for the station as a new allocation. Nevertheless, as noted above, the complete sentence entails the commitment to "take all necessary actions to build and operate the station in Menard as requested." That, of course, would involve

the action of applying for the Channel as a new allotment, open to competing expressions of interest.

18. In sum, Tichenor was and is committed to taking all necessary steps in furtherance of the new allotment at Menard. That includes applying for the Channel as a new allocation open to competing applications. This is supported by a fair reading of the Comments and Counterproposal and Tichenor's present reiteration of that pledge. There is no support for the contrary view that Tichenor requested that the Menard Counterproposal be processed under Section 1.420(i), or that Tichenor did not wish to apply for the Menard Channel. Consequently, the Menard Counterproposal was dismissed without a rational basis and should be reinstated as a valid counterproposal for a new allotment at Menard, Texas.

III. CONCLUSION

19. The Commission erred in not accepting the joint counterproposal. Far from being untimely, it could not have been filed in relation to the 1995 NPRM I. Instead, it is mutually exclusive with the allotment proposed in the 1996 NPRM II. As such, the joint counterproposal meets all legal and technical requirements and should have been accepted by the Commission. Similarly, the Commission erred in failing to honor Tichenor's commitment to take whatever action was necessary in furtherance of the joint counterproposal. As demonstrated above, that commitment fully entails applying for Channel 242C2 at Menard, Texas as a new allotment, open to competing applications.

20. In view of the above, the joint counterproposal should have been accepted and adopted by the Commission as the most efficient use of the applicable allotments.


WHEREFORE, Roy E. Henderson and Ticchenor License Corporation respectfully request that the Commission reverse the Report & Order and reinstate the counterproposal filed by the Joint Petitioners on September 2, 1996.

June 30, 1997

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Respectfully Submitted,

Roy E. Henderson

By: 
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202-452-4830

Ticchenor License Corporation

By: 
Roy R. Russo, Esq.
Its Attorney

Roy E. Henderson
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Houston, TX 77259

Engineering Statement
PETITION FOR RECONSIDERATION
MM Docket 95-49
Llano and Marble Falls, Texas
June 1997

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F. W. Hannel, PE
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Roy E. Henderson
Post Office Box 590209
Houston, TX 77259

Engineering Statement
PETITION FOR RECONSIDERATION
MM Docket 95-49
Llano and Marble Falls, Texas
June 1997

This firm has been retained by Roy E. Henderson, licensee of Radio Station KLTO(FM), Rosenberg, Texas, to prepare this engineering statement in support of a Petition For Reconsideration in the above captioned proceeding. On September 23, 1996, Henderson, along with the licensee of Radio Station KLTP(FM), filed a counterproposal in this proceeding seeking the allotment of FM Channel 285C3 to Missouri City, Texas, and the deletion of the presently assigned FM Channel 285A at Rosenberg, the deletion of FM Channel 285A at Galveston and the reassignment of that channel to Menard, Texas, on FM Channel 242C2. The allotment of FM Channel 242C2 at Menard, Texas, was in conflict with the Commissions Further Notice of Proposed Rulemaking which proposed the assignment of FM Channel 242A to Llano, Texas, as a replacement channel for FM Channel 284C3 at Llano, Texas.

On May 30, 1997, the Commission issued a Report and Order in this proceeding dismissing the proposal to allot FM Channel 285C3 to Missouri City, Texas, and the allotment of FM Channel 242C2 to Menard, Texas. That Report and Order stated:

4. We are dismissing both the proposal by Henderson for a Channel 285C3 reallocation to Missouri City, and the proposal by Tichenor for a Channel 242C2 reallocation to Menard, Texas. Section 1.420(i) specifically requires that the allotment at the new community be mutually exclusive with the existing authorization. In this situation, a Channel 242C2 allotment at Menard is not mutually exclusive with the Tichenor Station KLTP license on Channel 285A at Galveston. As such, this proposal cannot be considered in the context of Section 1.420(i) of the Rules. In this vein, a Channel 242C2 proposal is mutually exclusive with the Channel 242A allotment proposed in the Further Notice. The Channel 242C2 proposal at Menard could have been considered in this proceeding as a counterproposal for a new allotment. However, Tichenor specifically stated in its counterproposal that it commits to applying for and constructing the Channel 242C2 facilities at Menard "upon adoption of this entire counterproposal and the deletion of

STATE OF ILLINOIS)
)
COUNTY OF PEORIA) SS:

F. W. Hannel, after being duly sworn upon oath,
deposes and states:

He is a registered Professional Engineer, by
examination, in the State of Illinois;

He is a graduate Electrical Engineer, holding Bachelor
of Science and Master of Science degrees, both in Electrical
Engineering;

His qualifications are a matter of public record and
have been accepted in prior filings and appearances requiring
scrutiny of his professional qualifications;

The attached Engineering Report was prepared by him
personally or under his supervision and direction and;

The facts stated herein are true, correct, and
complete to the best of his knowledge and belief.

June 30, 1997



F. W. Hannel, P.E.

F. W. Hannel, PE
911 Edward Street
Henry, Illinois 61537
(309) 364-3903
Fax (309) 364-3775

Channel 285A from Galveston and the reallocation of that facility to KLTP as Channel 242C2 in Menard." We do not construe this statement as a commitment to apply for a Channel 242C2 as a new allotment for Mend subject to competing applications filed during a filing window. In the absence of such a commitment, we will not allot Channel 242C2 to Mend.

5. We are dismissing the Henderson counterproposal for a Channel 285C3 allotment at Missouri City because it is untimely. The Further Notice invited comments and counterproposals with regard to the proposed Channel 242A allotment at Llano. In this connection, the Further Notice specifically stated that we would not accept counterproposals regarding the reallocation of Channel 285C3 from Llano to Marble Falls. To be considered as a timely counterproposal in this proceeding, Henderson should have filed his Channel 285C3 counterproposal for Missouri City by the June 22, 1995, comment date set forth in the original Notice. Henderson did not file his counterproposal until September 23, 1996.

As will be shown, the Commission Order of May 30, 1997, dismissing the Henderson proposal was in error on several points because:

1. The Henderson proposal was timely filed.
2. Henderson could not have filed his counterproposal on June 22, 1995, for his proposal is not in conflict with the proposed allotment of FM Channel 285C3 at Marble Falls.
3. The Henderson proposal is not in conflict with the Commission's prior Notice proposing the allotment of FM Channel 284C3 to Marble Falls.

Initially it should be noted that Henderson filed a counterproposal in response to the NPRM issued on May 1, 1995, seeking the reallocation of FM Channel 285A from Rosenberg, Texas, to Katy, Texas. This proposal required that the licensee of Radio Station KBUK(FM), La Grange, Texas, would agree to change its transmitter site and city of license and that licensee declined to make such a commitment. The Katy proposal was withdrawn at the request of Henderson, was never placed on public notice or placed in the Commission's database.

In response to the Further Notice of Proposed Rulemaking issued in this proceeding, Henderson filed a joint counterproposal with the licensee of Radio Station

KLTP(FM), Galveston, Texas, seeking the reallocation of FM Channel 285A from Rosenberg, Texas, to Missouri City, Texas; the reallocation of FM Channel 285A from Galveston, Texas, to Menard, Texas, on FM Channel 242C2. The proposal to change Galveston from 285A to 242C2 at Menard, Texas, was the only conflict presented in the joint counterproposal.

Attached as Exhibit 1 is an FM Channel Study which shows that the assignment of FM Channel 285C3 at Missouri City, Texas, has only *one* conflict, namely with the present assignment of FM Channel 285A at Galveston, Texas. The assignment of FM Channel 285C3 at Missouri City, Texas, offers full protection to the previous proposal to allot FM Channel 285C3 to Marble Falls, Texas, in contravention with the Commission's Order, paragraph 5.

As a further matter, since the Henderson proposal to allot FM Channel 285C3 to Missouri City, Texas, fully complies with the minimum mileage separation requirements of the Commission's Rules, Henderson *could not have filed* his proposal at the earlier time stated by the Commission's Order in this proceeding. Simply stated, there *is no conflict* between the assignment of FM Channel 285C3 at Missouri City, Texas, and the assignment of FM Channel 285C3 at Marble Falls, Texas, in contravention with the Commission's Order.

As a final summary, the Henderson portion of the joint counterproposal is to simply reallocate FM Channel 285A from Rosenberg, Texas, to Missouri City, Texas. This portion of the joint counterproposal is in conflict with the assignment of FM Channel 285A at Galveston, Texas. To remove this conflict, the joint counterproposal requested the assignment of FM Channel 242C2 to Menard, Texas, and the licensee of Galveston, Texas, seeks to have its license amended to specify operation on FM Channel 242C2 at Menard, Texas, as provided in the Commission's Rules. This proposed use of FM Channel 242C2 at Menard, Texas, is in conflict with the proposed use of FM Channel 242A at Llano, Texas. (See Exhibit 2). There are no other technical conflicts present in the joint counterproposal.

Roy E. Henderson
Post Office Box 590209
Houston, TX 77259

Engineering Statement
PETITION FOR RECONSIDERATION
MM Docket 95-49
Llano and Marble Falls, Texas
June 1997

FM CHANNEL 285C3
Missouri City, Texas
N29-30-31 W95-27-58

Exhibit 1

CALL	CITY	ST	CHN	CL	S	DIST	SEPN	BRNG	CLR
ALC	Ganado	TX	284	C2	U	116.7	117.0	238.2°	-0.3
KZAM	Ganado	TX	284	C2	A	143.2	117.0	243.3°	26.2
KZAM	Ganado	TX	284	C2	C	116.7	117.0	238.2°	-0.3
ALC	Galveston	TX	285	A	U	73.7	142.0	105.3°	-68.3
ALC	La Grange	TX	285	A	U	141.7	142.0	287.0°	-0.3
ALC	Rosenberg	TX	285	A	U	31.1	142.0	279.0°	-110.9
KBAE	Marble Falls	TX	285	C3	A	283.2	153.0	291.5°	130.2
KBUK	La Grange	TX	285	A	L	141.7	142.0	287.0°	-0.3
KBUK	La Grange	TX	285	A	A	141.7	142.0	287.0°	-0.3
KLTO	Rosenberg	TX	285	A	L	33.2	142.0	301.5°	-108.8
KLTP	Galveston	TX	285	A	L	71.9	142.0	100.0°	-70.1

ALL DISTANCES IN KILOMETERS

Roy E. Henderson
Post Office Box 590209
Houston, TX 77259

Engineering Statement
PETITION FOR RECONSIDERATION
MM Docket 95-49
Llano and Marble Falls, Texas
June 1997

FM CHANNEL 242C2
Menard, Texas
N31-03-37 W99-35-26

Exhibit 2

CALL	CITY	ST	CHN	CL	S	DIST	SEPN	BRNG	CLR
ALC	Winters	TX	241	A	V	105.9	106.0	340.4°	-0.0
ALC	San Antonio	TX	241	C1	U	183.1	158.0	149.7°	25.1
KSJLFM	San Antonio	TX	241	C1	L	183.1	158.0	149.7°	25.1
NEW	Winters	TX	241	A	A	108.8	106.0	340.9°	2.8
ALC	Llano	TX	242	A	A	90.7	166.0	106.2°	-75.3
ALC	Del Rio	TX	242	C1	U	223.8	224.0	221.2°	-0.2
KTDR	Del Rio	TX	242	C1	L	223.8	224.0	221.2°	-0.2
ALC	Sterling City	TX	243	C2	U	160.6	130.0	297.8°	30.6
KAKR	Sterling City	TX	243	C2	C	133.5	130.0	296.6°	3.5

ALL DISTANCES IN KILOMETERS

CERTIFICATE OF SERVICE

I, Henry E. Crawford, do hereby certify that copies of the foregoing Joint
Petition for Reconsideration - Roy E. Henderson and Tichenor License
Corporation have been served by United States mail, postage prepaid this 30th
day of June, 1997 upon the following:

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Mass Media Bureau
Federal Communications
Commission
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Washington, D.C. 20554

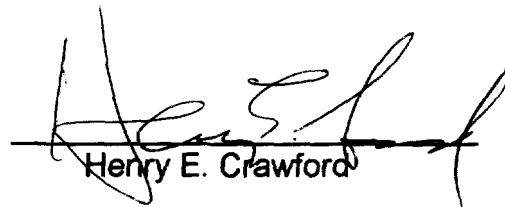
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*Hand Delivered



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